

SUBMISSION OF WRITTEN TESTIMONY BY FAIR OAKS OLD TOWN LLC

To: Hearing Officer

Subject: Revocation of Conditional Use Permit #2726

Hearing Date: July 15, 2020

Location: 72 N. Fair Oaks Avenue, Pasadena, CA

Applicant: City of Pasadena

Zoning Description: CD-1, AD-1 (Central District Specific Plan, Old Pasadena Subdistrict, Alcohol Density Overlay 1)

General Plan Designation: Medium Mixed Use

Case Planner: Mr. Luis Rocha

Fair Oaks Old Town LLC, a CA LLC, (“Fair Oaks”) is the owner of the property located at 72 N. Fair Oaks, Pasadena, CA 91103 (the “Premises”) which is the subject of a Hearing to Revoke Conditional Use Permit #2676 (the “CUP”). Fair Oaks offers this written testimony in opposition to the Staff Recommendation for Revocation of the CUP.

Fair Oaks has leased the Premises to Victoria’s Restaurant & Lounge LLC (“Victoria’s”). Victoria’s operates a German-style pub which includes food service under the name “Der Wolf.”

The CUP, which allows the service of alcoholic beverages, benefits the tenant, Victoria’s. However, it was originally issued in 1993 and is a covenant which runs with the land and is not specific to the tenant. After its issuance, the CUP was modified in 2001 and 2002. The CUP has been in good standing for 27 years, and the misconduct alleged in the Staff Report are the only instances of misconduct relating to the CUP during Fair Oaks’ ownership of the Property.

The CUP is a substantial property right of Fair Oaks and its revocation will cause significant harm to Fair Oaks. Fair Oaks respectfully requests that the recommendation to revoke the CUP be rejected.

First, Fair Oaks has not received required notice of this hearing in the manner required by the Pasadena Municipal Code. Section 17.76.020(B)(1) of the Pasadena Municipal Code requires that notice be mailed to the property owner at least 14 days before the hearing. Fair Oaks received notice of this hearing on July 13, 2020, only two days prior to the hearing, and then

only by e-mail. Indeed, the Staff Report identifies “July 4, 2020” as one of the dates of alleged violation of the CUP, but that date is less than 14 days prior to the hearing of July 15; it is therefore not possible for any alleged misconduct on that date to be considered at a hearing for which the owner must be notified 14 days in advance.

Furthermore, Fair Oaks has not been provided due process to address the issues raised in the citation dated May 16, 2020 or to address the additional violations alleged in the Staff Report for which no citation has been issued. The Administrative Citation, even though dated May 16, 2020, were not provided to Fair Oaks until July 13, 2020 – almost two months after the date of the citation and only two (2) days prior to the Hearing – and then, only by email as an attachment to the Staff Report. They were not received by Fair Oaks by mail. Prior to that, the only information that Fair Oaks had relating to the alleged violations was a telephone call to the property manager from a city official on June 24, 2020 describing the alleged misconduct only in generalities. The city official did send an email to Fair Oaks on that date. But immediately thereafter, the city official demanded the email be deleted, which we did. As a result, Fair Oaks has not had sufficient time to review and investigate the Citation or take any necessary corrective action.

The late-received Administrative Citation is also replete with errors, which means that it cannot properly serve as the basis for revocation of the CUP.

1. First, it names Peter Cohen as the owner of the Premises. As noted, the owner is Fair Oaks Old Town LLC, for which Peter Cohen serves as a managing member. Since the proper entity was not named, the Citation is not valid.
2. Next, the description of alleged violations is terse and vague, denying the property owner a meaningful opportunity to investigate and respond to the same. The Citation demands that Peter Cohen / Owner take corrective action to “Stop Serving alcohol past 1:00 a.m., stop operating past 1:30 a.m., and to offer food service while alcohol is being sold. Since Peter Cohen was not participating in any such activities (nor was Fair Oaks) at the Premises on May 16, 2020 or any time thereafter, there has been compliance as demanded. The Citation also demands corrective action described as “must meet applicable code requirements for all other departments.” This citation is too vague for enforcement as it does not identify the violation in a manner that allows the property owner an opportunity to respond or take corrective action.
3. The Citation is dated May 16, 2020 and demands compliance on May 16, 2020. This timing is impossible. Moreover, Pasadena Municipal Code Section 17.78.100(B)(1) requires a 30-day notice period for correction of violations, unless there is a “hazard to public health or safety.” Fair Oaks understands that the City is claiming a danger to health and public safety because of alleged violations of Safer at Home COVID19 regulations, but these were not the basis of the Citation issued nor are they even mentioned in the Citation. On their face, the violations listed do not meet the definition of a “hazard.”

The Staff Report, only provided to Fair Oaks on July 13, 2020 for a July 15, 2020 hearing, also has several errors.

1. First, it references an incident of May 8, 2020 involving Marcos Huerta, which is a different tenant at the property and not one under the CUP. Any actions taken by Mr. Huerta, and any communications with Mr. Huerta, cannot be considered as a basis for revoking the CUP.
2. The May 16, 2020 incident as described in the Staff Report references an alleged “violation” where the operator of Der Wolf had 9 “patrons” at the bar on May 16, 2020. Again, this incident was first reported to Fair Oaks on June 24, 2020, and then only in general terms during a telephone conversation with the property manager. This is not consistent with something the City of Pasadena considers a “hazard to public health or safety.”
3. Prior to receiving the Staff Report, Fair Oaks had no notice of the alleged incidents of June 27, 2020 but, as listed, these do not rise to a public health hazard (playing music or failing to serve food). In the Staff Report, the City attempts to make the “Safer At Home Order” part of the CUP, but there is no indication how the “Safer At Home Order” or what sections were violated, nor any notice given to allow for correction of such violations.
4. The Staff Report lists another violation of July 4, 2020, but the Memorandum dated July 10, 2020 references an incident of a different date, June 3-4, 2020. Fair Oaks therefore cannot meaningfully investigate or respond to the allegations of misconduct. Again, no citation was issued for this incident. Without proper reference and documentation, such incidents cannot be considered as a basis for revoking the CUP on short notice and without due process.

The notice requirements are not only the law, but they undoubtedly reflect the reality that a landlord needs time to take legal remedies with respect to a tenant that allegedly has failed to comply with a CUP. As Landlord, Fair Oaks is governed by the terms of the Lease. The Lease is a standard AIR multi-tenant form which requires the Landlord to provide the Tenant notice and an opportunity to cure alleged lease violations. (See Paragraph 13 of the Lease, a copy of which is attached.) Fair Oaks cannot under its contract require immediate (or as the City would seem to demand, retroactive) compliance with Lease terms. Paragraph 13.1(e) anticipates a 30-day Notice to Cure to be issued; or in the event of a nuisance or illegal activity, a 3-day notice (meaning business days). However, the assertion of vague violations during the course of a telephone call does not give cause to a 3-Day Notice to Cure; instead, there needs to be official written communication with sufficient specificity for the Landlord to act, and this was not provided until July 13, 2020. (Fair Oaks previously received a heavily “redacted” police report which did not include adequate information to support the issuance of 3-Day Notice.) Thus, it was impossible for the Landlord to issue a 3-Day Notice before July 13.

The difficulty for the Landlord to take corrective action with respect to a tenant is exacerbated by the pandemic, making the city’s demands for compliance under threat to revoke the CUP even

more burdensome and unrealistic. In the best of circumstances, it would take Fair Oaks months to accomplish an eviction. Presently, under order of the Judicial Council, there are no Summons being issued for Unlawful Detainer matters until 90 days after expiration of the Emergency Order by Governor Newsom, which has now been extended to September 30, 2020. The only exceptions are for proven emergencies with direct threats to health and safety. These exceptions are being applied in extremely limited circumstances, usually involving drugs or violent criminal activities.

To be clear, Fair Oaks takes the Safer at Home orders and COVID restrictions very seriously. Fair Oaks will, if given proper supporting documentation and cooperation from the City of Pasadena, undertake all reasonable efforts to ensure that its tenants do not violate such orders. In fact, since Governor Newsom just issued an order on July 13, 2020 to close all restaurants and bars (again), there is no reason to expect further CUP violations by Victoria's.

The remedy of revoking the CUP on short cause during a pandemic is draconian. Under the present circumstances, landlords are struggling to survive economically. The July 13 order forcing a shut-down of many retail establishments will only add to the difficulties and uncertainties. The CUP has been instrumental in obtaining and securing a tenant for the Premises. The City of Pasadena has a host of other remedies available to it to address the alleged misconduct at Victoria's, including filing request for civil injunction or simply pulling the business license issued to Victoria's while leaving the CUP in place so that it will be available for a new tenant.

Fair Oaks is entitled to due process which would be denied by this rushed hearing which was set without proper notice. The recommendation to revoke the CUP should be rejected.

Respectfully submitted,

Peter Cohen
Managing Member

Lease Default Provisions

exists, notwithstanding any claim from Lessee to the contrary.

(b) In the event of a Breach by Lessee, Lessor may, at its option, require sublessee to attorn to Lessor, in which event Lessor shall undertake the obligations of the sublessor under such sublease from the time of the exercise of said option to the expiration of such sublease; provided, however, Lessor shall not be liable for any prepaid rents or security deposit paid by such sublessee to such sublessor or for any prior Defaults or Breaches of such sublessor.

(c) Any matter requiring the consent of the sublessor under a sublease shall also require the consent of Lessor.

(d) No sublessee shall further assign or sublet all or any part of the Premises without Lessor's prior written consent.

(e) Lessor shall deliver a copy of any notice of Default or Breach by Lessee to the sublessee, who shall have the right to cure the Default of Lessee within the grace period, if any, specified in such notice. The sublessee shall have a right of reimbursement and offset from and against Lessee for any such Defaults cured by the sublessee.

13. Default; Breach; Remedies.

13.1 **Default; Breach.** A "Default" is defined as a failure by the Lessee to comply with or perform any of the terms, covenants, conditions or Rules and Regulations under this Lease. A "Breach" is defined as the occurrence of one or more of the following Defaults, and the failure of Lessee to cure such Default within any applicable grace period:

(a) The abandonment of the Premises; or the vacating of the Premises without providing a commercially reasonable level of security, or where the coverage of the property insurance described in Paragraph 8.3 is jeopardized as a result thereof, or without providing reasonable assurances to minimize potential vandalism.

(b) The failure of Lessee to make any payment of Rent or any Security Deposit required to be made by Lessee hereunder, whether to Lessor or to a third party, when due, to provide reasonable evidence of insurance or surety bond, or to fulfill any obligation under this Lease which endangers or threatens life or property, where such failure continues for a period of 3 business days following written notice to Lessee. **THE ACCEPTANCE BY LESSOR OF A PARTIAL PAYMENT OF RENT OR SECURITY DEPOSIT SHALL NOT CONSTITUTE A WAIVER OF ANY OF LESSOR'S RIGHTS, INCLUDING LESSOR'S RIGHT TO RECOVER POSSESSION OF THE PREMISES.**

(c) The failure of Lessee to allow Lessor and/or its agents access to the Premises or the commission of waste, act or acts constituting public or private nuisance, and/or an illegal activity on the Premises by Lessee, where such actions continue for a period of 3 business days following written notice to Lessee. In the event that Lessee commits waste, a nuisance or an illegal activity a second time then, the Lessor may elect to treat such conduct as a non-curable Breach rather than a Default.

(d) The failure by Lessee to provide (i) reasonable written evidence of compliance with Applicable Requirements, (ii) the service contracts, (iii) the rescission of an unauthorized assignment or subletting, (iv) an Estoppel Certificate or financial statements, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantor, (vii) any document requested under Paragraph 41, (viii) material data safety sheets (MSDS), or (ix) any other documentation or information which Lessor may reasonably require of Lessee under the terms of this Lease, where any such failure continues for a period of 10 days following written notice to Lessee.

(e) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b), (c) or (d), above, where such Default continues for a period of 30 days after written notice; provided, however, that if the nature of Lessee's Default is such that more than 30 days are reasonably required for its cure, then it shall not be deemed to be a Breach if Lessee commences such cure within said 30 day period and thereafter diligently prosecutes such cure to completion.

(f) The occurrence of any of the following events: (i) the making of any general arrangement or assignment for the benefit of creditors; (ii) becoming a "debtor" as defined in 11 U.S.C. § 101 or any successor statute thereto (unless, in the case of a petition filed against Lessee, the same is dismissed within 60 days); (iii) the appointment of a trustee or receiver to take possession of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where possession is not restored to Lessee within 30 days; or (iv) the attachment, execution or other judicial seizure of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where such seizure is not discharged within 30 days; provided, however, in the event that any provision of this subparagraph is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

(g) The discovery that any financial statement of Lessee or of any Guarantor given to Lessor was materially false.

(h) If the performance of Lessee's obligations under this Lease is guaranteed: (i) the death of a Guarantor, (ii) the termination of a Guarantor's liability with respect to this Lease other than in accordance with the terms of such guaranty, (iii) a Guarantor's becoming insolvent or the subject of a bankruptcy filing, (iv) a Guarantor's refusal to honor the guaranty, or (v) a Guarantor's breach of its guaranty obligation on an anticipatory basis, and Lessee's failure, within 60 days following written notice of any such event, to provide written alternative assurance or security, which, when coupled with the then existing resources of Lessee, equals or exceeds the combined financial resources of Lessee and the Guarantors that existed at the time of execution of this Lease.

13.2 **Remedies.** If Lessee fails to perform any of its affirmative duties or obligations, within 10 days after written notice (or in case of an emergency, without notice), Lessor may, at its option, perform such duty or obligation on Lessee's behalf, including but not limited to the obtaining of reasonably required bonds, insurance policies, or governmental licenses, permits or approvals. Lessee shall pay to Lessor an amount equal to 115% of the costs and expenses incurred by Lessor in such performance upon receipt of an invoice therefor. In the event of a Breach, Lessor may, with or without further notice or demand, and without limiting Lessor in the exercise of any right or remedy which Lessor may have by reason of such Breach:

(a) Terminate Lessee's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Lessee shall immediately surrender possession to Lessor. In such event Lessor shall be entitled to recover from Lessee: (i) the unpaid Rent which had been earned at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the Lessee proves could have been reasonably avoided; (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the Lessee proves could be reasonably avoided; and (iv) any other amount necessary to compensate Lessor for all the detriment proximately caused by the Lessee's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including but not limited to the cost of recovering possession of the Premises, expenses of reletting, including necessary renovation and alteration of the Premises, reasonable attorneys' fees, and that portion of any leasing commission paid by Lessor in connection with this Lease applicable to the unexpired term of this Lease. The worth at the time of award of the amount referred to in provision (iii) of the immediately preceding sentence shall be



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computed by discounting such amount at the discount rate of the Federal Reserve Bank of the District within which the Premises are located at the time of award plus one percent. Efforts by Lessor to mitigate damages caused by Lessee's Breach of this Lease shall not waive Lessor's right to recover any damages to which Lessor is otherwise entitled. If termination of this Lease is obtained through the provisional remedy of unlawful detainer, Lessor shall have the right to recover in such proceeding any unpaid Rent and damages as are recoverable therein, or Lessor may reserve the right to recover all or any part thereof in a separate suit. If a notice and grace period required under Paragraph 13.1 was not previously given, a notice to pay rent or quit, or to perform or quit given to Lessee under the unlawful detainer statute shall also constitute the notice required by Paragraph 13.1. In such case, the applicable grace period required by Paragraph 13.1 and the unlawful detainer statute shall run concurrently, and the failure of Lessee to cure the Default within the greater of the two such grace periods shall constitute both an unlawful detainer and a Breach of this Lease entitling Lessor to the remedies provided for in this Lease and/or by said statute.

(b) Continue the Lease and Lessee's right to possession and recover the Rent as it becomes due, in which event Lessee may sublet or assign, subject only to reasonable limitations. Acts of maintenance, efforts to relet, and/or the appointment of a receiver to protect the Lessor's interests, shall not constitute a termination of the Lessee's right to possession.

(c) Pursue any other remedy now or hereafter available under the laws or judicial decisions of the state wherein the Premises are located. The expiration or termination of this Lease and/or the termination of Lessee's right to possession shall not relieve Lessee from liability under any indemnity provisions of this Lease as to matters occurring or accruing during the term hereof or by reason of Lessee's occupancy of the Premises.

13.3 Inducement Recapture. Any agreement for free or abated rent or other charges, the cost of tenant improvements for Lessee paid for or performed by Lessor, or for the giving or paying by Lessor to or for Lessee of any cash or other bonus, inducement or consideration for Lessee's entering into this Lease, all of which concessions are hereinafter referred to as "Inducement Provisions", shall be deemed conditioned upon Lessee's full and faithful performance of all of the terms, covenants and conditions of this Lease. Upon Breach of this Lease by Lessee, any such Inducement Provision shall automatically be deemed deleted from this Lease and of no further force or effect, and any rent, other charge, bonus, inducement or consideration theretofore abated, given or paid by Lessor under such an Inducement Provision shall be immediately due and payable by Lessee to Lessor, notwithstanding any subsequent cure of said Breach by Lessee. The acceptance by Lessor of rent or the cure of the Breach which initiated the operation of this paragraph shall not be deemed a waiver by Lessor of the provisions of this paragraph unless specifically so stated in writing by Lessor at the time of such acceptance and reinstates the rights of Lessee to such inducement. Lessor maintains the right to apply the provisions of this paragraph 13.3 for any subsequent uncured breach by Lessee.

13.4 Late Charges. Lessee hereby acknowledges that late payment by Lessee of Rent will cause Lessor to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Lessor by any Lender. Accordingly, if any Rent shall not be received by Lessor within 5 days after such amount shall be due, then, without any requirement for notice to Lessee, Lessee shall immediately pay to Lessor a one-time late charge equal to 10% of each such overdue amount or \$100, whichever is greater. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Lessor will incur by reason of such late payment. Acceptance of such late charge by Lessor shall in no event constitute a waiver of Lessee's Default or Breach with respect to such overdue amount, nor prevent the exercise of any of the other rights and remedies granted hereunder. In the event that a late charge is payable hereunder, whether or not collected, for 3 consecutive installments of Base Rent, then notwithstanding any provision of this Lease to the contrary, Base Rent shall, at Lessor's option, become due and payable quarterly in advance.

13.5 Interest. Any monetary payment due Lessor hereunder, other than late charges, not received by Lessor, when due shall bear interest from the 31st day after it was due. The interest ("Interest") charged shall be computed at the rate of 10% per annum but shall not exceed the maximum rate allowed by law. Interest is payable in addition to the potential late charge provided for in Paragraph 13.4.

13.6 Breach by Lessor.

(a) **Notice of Breach.** Lessor shall not be deemed in breach of this Lease unless Lessor fails within a reasonable time to perform an obligation required to be performed by Lessor. For purposes of this Paragraph, a reasonable time shall in no event be less than 30 days after receipt by Lessor, and any Lender whose name and address shall have been furnished Lessee in writing for such purpose, of written notice specifying wherein such obligation of Lessor has not been performed; provided, however, that if the nature of Lessor's obligation is such that more than 30 days are reasonably required for its performance, then Lessor shall not be in breach if performance is commenced within such 30 day period and thereafter diligently pursued to completion.

(b) **Performance by Lessee on Behalf of Lessor.** In the event that neither Lessor nor Lender cures said breach within 30 days after receipt of said notice, or if having commenced said cure they do not diligently pursue it to completion, then Lessee may elect to cure said breach at Lessee's expense and offset from Rent the actual and reasonable cost to perform such cure, provided however, that such offset shall not exceed an amount equal to the greater of one month's Base Rent or the Security Deposit, reserving Lessee's right to reimbursement from Lessor for any such expense in excess of such offset. Lessee shall document the cost of said cure and supply said documentation to Lessor.

14. Condemnation. If the Premises or any portion thereof are taken under the power of eminent domain or sold under the threat of the exercise of said power (collectively "Condemnation"), this Lease shall terminate as to the part taken as of the date the condemning authority takes title or possession, whichever first occurs. If more than 10% of the floor area of the Unit, or more than 25% of the parking spaces is taken by Condemnation, Lessee may, at Lessee's option, to be exercised in writing within 10 days after Lessor shall have given Lessee written notice of such taking (or in the absence of such notice, within 10 days after the condemning authority shall have taken possession) terminate this Lease as of the date the condemning authority takes such possession. If Lessee does not terminate this Lease in accordance with the foregoing, this Lease shall remain in full force and effect as to the portion of the Premises remaining, except that the Base Rent shall be reduced in proportion to the reduction in utility of the Premises caused by such Condemnation. Condemnation awards and/or payments shall be the property of Lessor, whether such award shall be made as compensation for diminution in value of the leasehold, the value of the part taken, or for severance damages; provided, however, that Lessee shall be entitled to any compensation paid by the condemnor for Lessee's relocation expenses, loss of business goodwill and/or Trade Fixtures, without regard to whether or not this Lease is terminated pursuant to the provisions of this Paragraph. All Alterations and Utility Installations made to the Premises by Lessee, for purposes of Condemnation only, shall be considered the property of the Lessee and Lessee shall be entitled to any and all compensation which is payable therefor. In the event that this Lease is not terminated by reason of the Condemnation, Lessor shall repair any damage to the Premises caused by such Condemnation.



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